

Keep Your Lunch Money: Alleviating Workplace Bullying with Mediation

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I. INTRODUCTION

American popular culture has turned workplace bullies into a parody. From *American Idol*'s Simon¹ to *House*'s Dr. Gregory House,² society knows of workplace bullying as an exaggeration for comic effect. In reality, however, when most of us think of bullying, our minds flash back to the playground or schoolyard. As we progress to the professional phases of our lives, we expect a work environment governed by rules that foster respect, as well as personal and professional growth. Some of us, however, discover a bully occupying the cubicle next door, or in the corner office down the hall.

Workplace bullying is a serious problem for both employees and employers. "Twenty-three million Americans experience workplace bullying within their work lifetimes."³ With the economy spiraling downward and job loss on the rise,⁴ employees may feel as though they are "on thin ice" at

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¹ Carolyn Said, *Bullying Bosses Could Be Busted: Movement Against Worst Workplace Abusers Gains Momentum with Proposed Laws*, S.F. CHRON., Jan. 21, 2007, at F1.

² See *House* (NBC Universal 2009).

³ MARGARET R. KOHUT, *THE COMPLETE GUIDE TO UNDERSTANDING, CONTROLLING, AND STOPPING BULLIES & BULLYING AT WORK: A GUIDE FOR MANAGERS, SUPERVISORS, AND EMPLOYEES* 30-31 (2008) ("One in six employees experience workplace bullying in their lifetimes. In terms of gender, at least fifty percent of workplace bullies are female. Eighty percent of bullying targets are female. Four out of five minority employees will encounter workplace bullying.").

⁴ David Goldman, *Worst Year for Jobs Since '45*, CNN.COM, Jan. 9, 2009, http://money.cnn.com/2009/01/09/news/economy/jobs_december/index.htm?eref=edition. Goldman explains that the United States is experiencing the biggest annual job loss since the end of World War II, bringing 2008's total to 2.6 million jobs lost. The unemployment rate rose to 7.2% in December 2009 from 6.7% in November 2008—its highest rate since January 1993. *Id.*

work. As a result, it is unlikely that bullied employees will risk their jobs to alleviate the conflicts they experience at work. This note explores what scholars and academics have called the “phenomenon of workplace bullying”⁵ and considers the potential of integrating facilitative mediation into an organization’s structure and culture in order to resolve the interpersonal conflict that results from workplace bullying.

In Part II, this note addresses what workplace bullying is and how it invades work environments to the detriment of the entire organization. Part II defines workplace bullying, discusses its causes, describes its negative consequences on the workplace, discusses generally the lack of legal redress for a bully’s victim, and describes a few possible remedies a victim may be able to take advantage of in certain circumstances.

As a mechanism to diffuse workplace bullying, Part III of this note proposes integrating an internal process based predominately upon facilitative mediation, while incorporating transformative mediation techniques. Part III is grounded on the premise that mediation is a practical and effective tool that can be used to resolve interpersonal conflict that impacts people in personal or emotional ways.⁶ Part III focuses on mediation as a whole, describes the three most common forms of mediation, and discusses how mediation can benefit the workplace.

Part IV argues that integrating a facilitative mediation process, while incorporating transformative mediation’s strengths, can resolve the interpersonal conflict that results from workplace bullying. Part IV concludes with suggestions on how an organization can structure its facilitative mediation process in order to achieve success (i.e., successfully resolve workplace bullying issues). Part V concludes this note by reiterating the seriousness of leaving workplace bullying conflicts unresolved, and urges employers to consider adopting a facilitative mediation process focused on effectively resolving bullying conflicts.

⁵ See, e.g., David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2000). Yamada proposes a statutory cause of action designed to provide bullied employees legal recourse against both the bully and employer. *Id.* A Google search of “workplace bullying” conducted on Dec. 28, 2009 returned approximately 172,000 hits. The names that appear the most are Dr. Ruth Namie and Dr. Gary Namie, founders of the Workplace Bullying Institute. See <http://workplacebullying.org/> for more information about their research and findings.

⁶ See REBECCA JANE WEINSTEIN, *MEDIATION IN THE WORKPLACE: A GUIDE FOR TRAINING, PRACTICE, AND ADMINISTRATION* 21 (2001).

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II. WORKPLACE BULLYING

A. Workplace Bullying Defined

Academics, scholars and organizational psychologists refer to the phenomenon of workplace bullying as repeated mistreatment of a “Target” (the recipient or victim of the bullying) by a harassing bully (a supervisor or co-worker) that is motivated by the desire to control the Target.⁷ Workplace bullying has also been defined as “repeated, unreasonable actions of individuals (or a group) directed towards an employee (or a group of employees), which is intended to intimidate and creates a risk to the health and safety of the employee(s).”⁸ Emotional bullying in the workplace by more than one person is called “mobbing.”⁹ Specifically, mobbing occurs when superiors, co-workers, or subordinates gang up to force someone out of the workplace.¹⁰ The bullying behavior tends to manifest through status¹¹

⁷ GARY NAMIE & RUTH NAMIE, *THE BULLY AT WORK: WHAT YOU CAN DO TO STOP THE HURT AND RECLAIM YOUR DIGNITY ON THE JOB* 4 (2000). Namie and Namie capitalize the word “Target” out of respect and sympathy for Target employees who are victimized by bullies. *Id.*

⁸ *Workplace Bullying: What Everyone Needs to Know*, SHARP Report # 87-2 2008 (Wash. Dept. of Labor & Indus., Olympia, WA), April 2008, at 1, available at <http://www.lni.wa.gov/Safety/Research/Files/Bullying.pdf>; see also KOHUT, *supra* note 3, at 28 (discussing workplace bullying statistics).

⁹ NOA DAVENPORT ET AL., *MOBBING: EMOTIONAL ABUSE IN THE AMERICAN WORKPLACE* 33 (1999).

¹⁰ *Id.*; see also M. Neil Browne & Mary A. Smith, *Mobbing in the Workplace: The Latest Illustration of Pervasive Individualism in American Law*, 12 EMP. RTS. & EMP. POL’Y J. 131–32 (2008). For example, Brown and Smith describe mobbing as a group of employees gathered in the employee lounge, talking and enjoying break time. A newly hired employee approaches the group, desiring to join the group. The group, instead of welcoming the new employee, ignores and brushes off the new employee. The group acts with the hope to ostracize and isolate the new employee. Upon returning to work, the group of employees greets the employee with insults and rumors. This type of behavior is also characterized as “moral harassment,” “psychological harassment,” and “victimization.” *Id.*

¹¹ TIMOTHY GLYNN ET AL., *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* 244 (2007) (discussing status-based discrimination). Title VII makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2000). The Age Discrimination in Employment Act of 1967 (ADEA), prohibits employment discrimination “because of such individual’s age.” 29 U.S.C. § 631(a) (2006). The ADEA

and non-status harassment, or discrimination, innuendo, humiliation, harming another's reputation and credibility, intimidation, and malicious isolation.¹² When clustered together, abusive behaviors also are considered workplace bullying.¹³ These behaviors include:

aggressive eye contact, either by glaring or meaningful glances; giving the silent treatment; intimidating physical gestures, including finger pointing and slamming or throwing objects; yelling, screaming, and/or cursing at the Target; angry outbursts or temper tantrums; nasty, rude, and hostile behavior toward the Target; accusations of wrongdoing, insulting or belittling the Target, often in front of other workers; excessive or harsh criticism of the Target's work performance; spreading false rumors about the Target; breaching the Target's confidentiality; making unreasonable work demands of the Target; withholding needed information; [and] taking credit for the Target's work.¹⁴

The bully can be a subordinate, peer, co-worker, supervisor, or CEO.¹⁵ Sixty percent of workplace bullies are of "higher institutional status than the Target," while "20% are of equal status," and "20% are of lower status."¹⁶ These statistics reiterate that workplace bullying is a serious problem and explain why organizations need to start paying closer attention to its effects.

B. Causes of Workplace Bullying

Various internal and external pressures cause workplace bullying.¹⁷ With the downfall of traditional labor, the rise of management's assertion that unions impede efficient production, technological advances, globalization, and increased regulation of employment, U.S. workplaces reorganized to

defines "age" to include only those at least forty years of age. *Id.*; see also The Americans with Disabilities Act of 1991, 42 U.S.C. §§ 12101, 12112(a) (2000) (prohibiting employment discrimination "on the basis of a disability").

¹² DAVENPORT ET AL., *supra* note 9, at 33.

¹³ Loreleigh Keashly, *Emotional Abuse in the Workplace: Conceptual Empirical Issues*, 1 J. EMOTIONAL ABUSE 85, 97-98 (1998).

¹⁴ *Id.*

¹⁵ DAVENPORT ET AL., *supra* note 9, at 48.

¹⁶ Yamada, *supra* note 5, at 481 (citing Christine M. Pearson, Incivility and Aggression at Work: Executive Summary 109 (July 1998) (unpublished manuscript, on file with author)).

¹⁷ See generally DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS 65 (2003).

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face competition from abroad.¹⁸ As organizations reorganize and scout for collaborative leaders to manage diversity and work teams become more diverse, conflict increases.¹⁹ In order for organizations to be active problem solvers, encourage creativity and innovation, they need to examine, engage, and learn from its conflicts.²⁰ Some conflict is healthy because it leads to innovative and creative work solutions.²¹ However, unhealthy conflict arises when supervisors acknowledge and reward aggressive behaviors to the extent that these behaviors no longer achieve performance goals, but instead detract from the overall work environment.²²

Organizational culture that praises strong management often promotes bullying behavior because aggressive behavior is integrated within a culture that endorses short-term performance goals and disregards staff support.²³ Workplace bullying is most prominent in situations when a new CEO or

¹⁸ *Id.* (asserting that this general reorganization was grounded in the decline of hierarchical organizations and the increased use of team-based products).

¹⁹ See KENNETH CLOKE & JOAN GOLDSMITH, *RESOLVING PERSONAL AND ORGANIZATIONAL CONFLICT: STORIES OF TRANSFORMATION AND FORGIVENESS* 125 (2000) (discussing the appropriate organizational culture that fosters both change and growth while minimizing the negative consequences of conflict); SY LANDAU ET AL., *FROM CONFLICT TO CREATIVITY: HOW RESOLVING WORKPLACE DISAGREEMENTS CAN INSPIRE INNOVATION AND PRODUCTIVITY* x (2001).

²⁰ CLOKE & GOLDSMITH, *supra* note 19, at 125.

²¹ See LANDAU ET AL., *supra* note 19, at xi (discussing how conflict can be a catalyst for change, and if an organization fosters a culture that supports creative contention, the organization can benefit from conflict).

²² Brian Amble, *Aggressive Managers Get Ahead Faster*, MGMT.-ISSUES: THE HEART OF A CHANGING WORKPLACE, Jan. 22, 2003, http://www.management-issues.com/2006/8/24/research/aggressive-managers-get-ahead-faster.asp?section=research&id=455&specifier=&is_authenticated=0&reference (discussing how bullying managers tend to get promoted); see also PETER RANDALL, *BULLYING IN ADULTHOOD: ASSESSING THE BULLIES AND THEIR VICTIMS* 32–54 (2001) (discussing how workplace bullying is a variety of human aggression); Claire Mayhew, *Occupational Violence in Industrialized Countries: Types, Incidence Patterns and 'At Risk' Groups of Workers*, in *VIOLENCE AT WORK: CAUSES, PATTERNS AND PREVENTION* 30 (Martin Gill et al. eds., 2002) (discussing how employees who feel insecure about their employment are less likely to report workplace violence or bullying to management). See generally Claire Lawrence, *Social Psychology of Bullying in the Workplace*, in *BUILDING A CULTURE OF RESPECT: MANAGING BULLYING AT WORK* 61–76 (Noreen Tehrani ed., 2001) (discussing how bullying behavior is often rewarded through the organizational culture).

²³ JOHN CRAWLEY & KATHERINE GRAHAM, *MEDIATION FOR MANAGERS: RESOLVING CONFLICT AND REBUILDING RELATIONSHIPS AT WORK* 15–16 (2002).

manager stimulates office change and productivity.²⁴ Also, bullying commonly occurs when supervisors establish their dominance over a new employee, or when a current employee speaks out against and confronts the employee's supervisor.²⁵ Co-workers or peers often bully fellow employees because of fear, jealousy, or pressures from within a competitive work environment.²⁶ Few organizations offer employees the type of ongoing support needed to change perceptions and behaviors that fuel workplace bullying.²⁷ Because of the various pressures that cause workplace bullying, in-house mediation systems should be integrated into organizations' values.

C. Negative Consequences of Workplace Bullying

Workplace bullying takes its toll on both employees and employers.²⁸ Employers face the negative effects of bullying in the form of decreased productivity and loyalty, as well as higher workplace attrition and turnover.²⁹ These effects have a long-term impact on the employer, "tarnish[ing] [its] image," as well as damaging its reputation and credibility with "customers,

²⁴ DAVENPORT ET AL., *supra* note 9, at 48; *see also* Brian Amble, *Employers Failing to Deal with Bullies*, MGMT.-ISSUES: THE HEART OF A CHANGING WORKPLACE, Nov. 1, 2006, <http://www.management-issues.com/2006/11/1/research/employers-failing-to-deal-with-bullies.asp> (discussing bullying managers in the United Kingdom, which occurs most often in organizations undergoing change). Amble states that organizations generally lack workplace policies opposed to workplace bullying. *Id.*

²⁵ DAVENPORT ET AL., *supra* note 9, at 48.

²⁶ *Id.* at 48 (providing an extensive discussion of the motivations behind workplace mobbing and explaining that these motivations stem from jealousy, envy, greed, and aspirations). Davenport et al. explain that peers are resentful of another who is better looking or who gets more attention from the boss. The bully wants to "climb the ladder" of success not based on her own performance, but by eliminating those that might be in the way of her success. *Id.*

²⁷ CLOKE & GOLDSMITH, *supra* note 19, at 128 (asserting that for "organization[s] to function well, the individuals who belong to it need to be supported in resolving their disputes and changing their behavior," and that "[t]o do so, the organization needs to create systems, structures, cultures, strategies, and shared values that do not reinforce conflict-promoting behavior"). In order for these systems to flourish, they must be supported by the organization's top echelon. *Id.*

²⁸ Keashly, *supra* note 13, at 97–98; *see also* KOHUT, *supra* note 3, at 135–50 (discussing the negative implications of workplace bullying on the organization and individual employees).

²⁹ Keashly, *supra* note 13, at 97–98; *see also* Kris Maher, *Career Journal: The Jungle*, WALL ST. J., Apr. 15, 2003, at B8 (discussing the negative consequences faced by the organization as a whole because of workplace bullying).

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clients, and shareholders.”³⁰ Interpersonal conflict in the form of bullying leads to conversations flooded with emotions.³¹ If an organization ignores bullying long enough, the conflict between the bully and Target may spiral out of control, impacting the entire workplace and placing the organization at risk of threats of litigation and trauma.³² Other effects of workplace bullying include factionalism, increased sick leave, unemployment insurance claims, and workers’ compensation claims.³³ These repercussions, compounded with the actual day-to-day bullying, negatively impact the quality and quantity of work.³⁴

The negative effects of workplace bullying are not limited to the organization’s bottom line. Bullying victims are inflicted with serious harm that encompasses stress-related health diseases, high blood pressure, digestive problems, clinical depression, and anxiety disorders.³⁵ This in turn negatively impacts an individual’s competence; for example, bullying may cause an employee to increase errors and decrease an employee’s ability to cope under pressure.³⁶ Targets of bullying become disconnected and

³⁰ CRAWLEY & GRAHAM, *supra* note 23, at 20.

³¹ *Id.* at 20 (asserting that this type of interpersonal conflict in the workplace causes the Target to create negative feelings about themselves and colleagues, resulting in undermined morale and reduced productivity); *see also* CLOKE & GOLDSMITH, *supra* note 19, at 171 (explaining that when people are emerged in conflict their emotions build, rational communication diminishes, and the boundaries between them are completely violated). Cloke and Goldsmith suggest that mediation allows for the clarity of personal boundaries and promotes the possibility of resolution and interconnection. *Id.*

³² NAMIE & NAMIE, *supra* note 7, at 4.

³³ DAVENPORT ET AL., *supra* note 9, at 139–41. The damage done to the organization and the employee is cyclical. The less productive the organization, the more pressure there is on mid-level managers to push their subordinates to perform better. This creates the potential for more bullying and greater physical and emotional health risks to the employee, as well as bottom-line risks to the employer. *Id.*

³⁴ *See* Benedict Carey, *Fear in the Workplace: The Bullying Boss*, N.Y. TIMES, June 22, 2004, at F1 (discussing how some bullied employees withhold unpaid extra services that help an organization, in turn, hurting customer and co-worker relations); *see also* YOAV VARDI & ELY WEITZ, MISBEHAVIOR IN ORGANIZATIONS: THEORY, RESEARCH, AND MANAGEMENT 77–78 (2004) (defining “counter productive workplace behavior” as “any intentional behavior that is deemed by the organization to run counter to its legitimate interests. This behavior is considered a facet of job performance.”). For example, Vardi and Weitz explain that an employee who intentionally ignores or violates safety regulations—regulations they know should be abided for their own protection and the protection of other—behaves in a counterproductive way. *Id.*

³⁵ Keashly, *supra* note 13, at 97–98.

³⁶ CRAWLEY & GRAHAM, *supra* note 23, at 19 (asserting that bullying may cause an employee to increase errors and decreases an employee’s ability to cope under pressure).

disoriented in their work environment.³⁷ Thus, employees are unable to meet their professional goals, resulting in less effective working relationships with colleagues.³⁸ Furthermore, bullying also impacts the Target outside of the work environment. This mistreatment threatens the economic livelihood of not only the Target, but also the Target's family.³⁹ In some instances, bullying may escalate to such an extent that it impacts a Target's career as a whole, threatening years of educational and professional investment.⁴⁰

D. Potential, But Weak Sources of Redress

There are few paths a Target employee can take to seek legal redress for bullying. For at-will employees,⁴¹ statutory and common law protections are not helpful to prevent or remedy bullying.⁴² Limited sources of protection include tort claims for intentional infliction of emotional distress (IIED), workers' compensation claims, civil rights legislation, the Occupational Safety and Health Act (OSHA),⁴³ the National Labor Relations Act (NLRA)⁴⁴ and public policy exceptions to at-will employment.⁴⁵

³⁷ *Id.* at 20.

³⁸ *Id.* at 19–20.

³⁹ NAMIE & NAMIE, *supra* note 7, at 7.

⁴⁰ *Id.*

⁴¹ See EmployeeIssues.com, Employment at Will States, http://employeeissues.com/at_will_states.htm (last visited Mar. 3, 2009) (discussing how all states are at-will employment states, meaning that an employer can terminate an employee for any reason, except an illegal one. Montana is unique in that it upholds at-will employment only when employees are newly hired and working during a probationary period; otherwise, Montana employers must show good cause to terminate employees).

⁴² Yamada, *supra* note 5, at 478.

⁴³ Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. § 651 (2006). The congressional purpose behind OSHA is to establish policies that prevent workplace injuries and illnesses, and to ensure safe working conditions. *Id.*

⁴⁴ National Labor Relations Act (NLRA) of 1935, 29 U.S.C. §§ 151–69 (2006); see also NATIONAL LABOR RELATIONS BOARD, OVERVIEW: NATIONAL LABOR RELATIONS ACT, available at http://www.nlr.gov/about_us/overview/national_labor_relations_act.a.spx# (last visited Dec. 14, 2009) (discussing Congress's purpose behind the NLRA as "to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.").

⁴⁵ Yamada, *supra* note 5, at 493. This note will not address unionized work settings. The NLRA does not impact at-will employment workplaces. There is no specific OSHA standard that has been adopted to address bullying-related hazards in the workplace. Yamada contends that the most serious effects of bullying, such as high blood pressure

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1. Remedies Under Tort Law

A Target experiencing severe mistreatment may file a claim based on intentional infliction of emotional distress (IIED).⁴⁶ These claims are often unsuccessful because the claim explicitly excludes common bullying attributes, including “mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.”⁴⁷ These claims have a tendency to fail because courts are inclined to find that workplace bullying cases lack extreme and outrageous conduct, or that the Target employee did not suffer severe emotional distress.⁴⁸ Workplace bullying IIED claims are most successful when they are related to or grounded in status-based discrimination or harassment.⁴⁹ Although the threshold for proving extreme or outrageous conduct and severe emotional distress is high, IIED claims may be the only source of redress for Target employees who are not members of a protected class.⁵⁰

When new employers seek references from the old employer, tort claims for defamation may provide the employee with limited redress.⁵¹ This claim is aimed at protecting the Target employee’s reputation and credibility.⁵² This cause of action arises when statements are made in “writing (libel) or orally (slander) that tend ‘to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from association or dealing with him.’”⁵³ Some courts are unfriendly to

and heart attacks, may satisfy “serious physical harm” included in OSHA’s general duty clause. *Id.* at 521; *see also* DAVENPORT ET AL., *supra* note 9, at 174–82.

⁴⁶ NAMIE & NAMIE, *supra* note 7, at 54, 107; RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965). IIED occurs when “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe and emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” *Id.* at (1).

⁴⁷ RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965); *see also* NAMIE & NAMIE, *supra* note 7, at 107–08.

⁴⁸ Yamada, *supra* note 5, at 494.

⁴⁹ *Id.* at 500; *see also* GLYNN ET AL., *supra* note 11, at 244.

⁵⁰ Yamada, *supra* note 5, at 503.

⁵¹ DAVENPORT ET AL., *supra* note 9, at 178; Michelle Cottle, *WORKING: When a Boss Turns Abusive*, N.Y. TIMES, Nov. 29, 1998, at B11.

⁵² GLYNN ET AL., *supra* note 11, at 244.

⁵³ RESTATEMENT (SECOND) OF TORTS § 558 (1977) (*quoted in* GLYNN ET AL., *supra* note 11, at 238). A defamation claim is successful when all four elements are met: (a) a false and defamatory statement concerning another—has to be false to be actionable; (b) unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher (fault at least negligence); and (d) either actionability of the

defamation claims and conclude that they “*imply* incompetence or inability to perform.”⁵⁴

2. Workers’ Compensation

Workers’ compensation statutes provide a no-fault system that passes the cost of reimbursing employees for workplace injuries on to customers.⁵⁵ Employers prefer worker compensation claims because damages are capped at a much lower level than remedies available under tort law.⁵⁶ Victims are often disappointed because many courts are opposed to granting compensation for mental injuries due to emotional abuse in the workplace.⁵⁷ However, a handful of states have recognized “mental-mental”⁵⁸ injuries and compensate mental illnesses even when there is no accompanying physical injury caused by workplace bullying.⁵⁹ Overall, most states do not award compensation unless an employee’s mental injury is a result of physical injury on the job.⁶⁰ Furthermore, since consumers are footing the bill, workers’ compensation fails to adequately address the underlying causes of

statement irrespective of special harm or the existence of special harm caused by the publication). *Id.*

⁵⁴ DAVENPORT ET AL., *supra* note 9, at 178.

⁵⁵ Yamada, *supra* note 5, at 506–07.

⁵⁶ *Id.*; see also GLYNN ET AL., *supra* note 11, at 265 (discussing how this system embodies a trade-off: Employers are strictly liable for workplace injuries, but recovery is more limited than under traditional tort law, and intentional injuries are not excluded from tort recovery).

⁵⁷ DAVENPORT ET AL., *supra* note 9, at 181; GLYNN ET AL., *supra* note 11, at 824 (discussing the controversy surrounding “mental-mental” claims). The authors define “mental-mental” claims as “mental or nervous injuries caused by mental stimulus.” *Id.*

Although most states now provide workers’ compensation coverage for mental-mental claims, some do not. Of the states that accept such claims, some require no greater showing than that required for claims for physical injuries, some require a showing that a sudden stimulus caused the psychological or mental injury; and still others require a showing that the mental stress was unusual in the given context.

Id.

⁵⁸ DAVENPORT ET AL., *supra* note 9, at 181; see also GLYNN ET AL., *supra* note 11, at 824.

⁵⁹ DAVENPORT ET AL., *supra* note 9, at 181. These states include Arizona, California, Iowa, Wisconsin, and Wyoming. *Id.*

⁶⁰ *Id.* at 182.

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workplace bullying and does not provide for effective preventative measures.⁶¹

3. *Public Policy Exceptions and Other Forms of Legal Redress*

Since the doctrine of at-will employment is unfriendly to claims for continued employment, a Target employee's options are often limited to seeking redress through the public policy exceptions to at-will employment—for example, unjust or wrongful discharge.⁶² The public policy exceptions to at-will employment may prohibit an employer from terminating an employee based upon abuse or retaliation.⁶³ For example, a supervisor who terminates a Target may have been motivated by the desire to keep the Target from reporting the office bullying, thus resulting in a wrongful termination.⁶⁴

Another possible form of legal redress is if a written employment agreement existed between the employee and employer.⁶⁵ A written agreement including a just cause provision may prevent an employer from terminating an employee for reporting bullying.⁶⁶ A terminated employee may still have hope even if he lacks a formal written agreement.⁶⁷ The Target may have a claim against the Target's employer if the Target can prove that

⁶¹ Yamada, *supra* note 5, at 507.

⁶² *Id.* at 504 (discussing how courts generally desire to avoid becoming Human Resource managers responsible for personnel decisions); *see also* GLYNN ET AL., *supra* note 11, at 65–270 (discussing the doctrine of at-will employment and its limits).

⁶³ DAVENPORT ET AL., *supra* note 9, at 180.

⁶⁴ *Id.* This type of discharge would be in violation of public policy.

⁶⁵ *Id.* at 178; *see also* GLYNN ET AL., *supra* note 11, at 123–58 (discussing written employment contracts and expressly negotiated terms of employment).

⁶⁶ DAVENPORT ET AL., *supra* note 9, at 178; *see also* GLYNN ET AL., *supra* note 11, at 123–58.

⁶⁷ DAVENPORT ET AL., *supra* note 9, at 178–79; *see also* GLYNN ET AL., *supra* note 11, at 96, 169–71 (discussing whether an implied-in-fact promise has provided for continued employment and has arisen from workplace personnel practices or policies, the employee's longevity of service, and assurances of continued employment from the employer). In some instances a court will find that an employer violated an implied covenant of "good faith and fair dealing." *Id.* However, some courts have rejected the applicability of the implied duty of good faith to at-will employment relationships. Although an implied-in-law contract based on the duty of good faith and fair dealing exists, it is not always a viable option for a terminated Target employee. *Id.*; *see also* AMY DELPO & LISA GUERIN, *DEALING WITH PROBLEM EMPLOYEES: A LEGAL GUIDE* 2.2–2.39 (2d ed. 2003) (discussing at-will employment, employment contracts, breaches of good faith and fair dealing, and terminations that violate public policy).

the Target had an oral, implied-in-fact, or implied-in-law employment contract.⁶⁸ Overall, as a result of its status-blind character, workplace bullying is seldom illegal.⁶⁹

Organizations supporting and fostering “zero-tolerance” clauses enable their supervisors to bully Targets over a period of time.⁷⁰ Bullying supervisors are permitted to immediately terminate the Target employee if the employee reacts to the bullying in a negative, threat-like, or violent manner.⁷¹ Although not a foolproof remedy, some scholars suggest that Target employees should develop a journal to document their bullying experiences, finding that this action alleviates some of their stress because it serves as a method to express anger and frustration.⁷² Overall, Target employees have few options to seek redress. Due to the limited recourse available to Targets, organizations should start considering mediation as a process to alleviate bullying issues in the workplace.

III. MEDIATION

Mediation is an appropriate system to address workplace bullying because it “encourag[es] people in conflicts to perceive and accept their commonalities . . . to acknowledge their differences and see themselves as separate from their opponents, with clear boundaries, identities, interests, and

⁶⁸ DAVENPORT ET AL., *supra* note 9, at 178–79; DELPO & GUERIN, *supra* note 67, at 2.2–2.39; GLYNN ET AL., *supra* note 11, at 96, 169–71.

⁶⁹ J. A. Richman et al., *Sexual Harassment and Generalized Workplace Abuse Among University Employees: Prevalence and Mental Health Correlates*, 89 AM. J. PUB. HEALTH 358–63 (1999) (cited in NAMIE & NAMIE, *supra* note 7, at 6–7) (discussing how bullying defined as “general workplace abuse,” was four times more widespread than sexual harassment); Yamada, *supra* note 5, at 492; *see also* Maher, *supra* note 29.

⁷⁰ NAMIE & NAMIE, *supra* note 7, at 9.

⁷¹ *Id.* (explaining that this type of manager authority does not allow the organization to root out the source and cause of the emotional response from the bullying). However, bullying supervisors upholding zero-tolerance policies may be rewarded when they terminate an employee for what appears to be insubordination, yet the employee may be speaking up against being bullied. *Id.*; *see also* Maher, *supra* note 29 (discussing briefly how stressful and competitive workplaces may be breeding grounds for bullying managers).

⁷² NAMIE & NAMIE, *supra* note 7, at 31–32; *see also* PETER RANDALL, ADULT BULLYING: PERPETRATORS AND VICTIMS 138 (1997) (discussing how Targets should “keep careful records of the various incidents and the circumstances which led up to [the bullying]” and asserting that “[t]hese records need not be produced at the time of a confrontation with the bully but should be used in any subsequent interviews with senior managers in the organization”).

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rights.”⁷³ Facilitative mediation is a process that can effectively resolve bullying because mediation highlights the “wholeness of the human experience.”⁷⁴ But mediation comes in many forms and not all are appropriate to address workplace bullying. Part III discusses mediation generally and then elaborates on three common types of mediation: facilitative, transformative, and evaluative mediation.

A. *Mediation: The Process Undressed*

Although mediations come in different shapes and sizes, there are common characteristics and processes utilized in all types.⁷⁵ In order to lay the foundation for open dialogue, a mediator generally has to craft an environment that makes the parties feel safe to reveal their emotions and thoughts about the dispute.⁷⁶ Complete trust in the process and mediator must exist before the parties will give the process a chance.⁷⁷ Mediation

⁷³ CLOKE & GOLDSMITH, *supra* note 19, at 168; CRAWLEY & GRAHAM, *supra* note 23, at 3 (expanding the definition of mediation to not only assisting people in a dispute, but also “explor[ing] and understand[ing] their differences and, if possible . . . settl[ing] them.”); MARICK F. MASTERS & ROBERT R. ALBRIGHT, *THE COMPLETE GUIDE TO CONFLICT RESOLUTION IN THE WORKPLACE* 145–45 (2002) (describing mediation as the “intervention into a dispute or negotiation of an acceptable, impartial and neutral third party who has no decisionmaking authority,” and explaining that “[t]he objective of this mediation is to assist the parties in voluntarily reaching an acceptable resolution of issues in dispute”); VIBEKE VINDELØV, *MEDIATION: A NON-MODEL* 98 (2007) (defining “conflict mediation” as a “voluntary and confidential method of resolving conflicts where, through a structured process, one or more impartial third parties assist the parties in reaching a solution by themselves to their problem which is mutually satisfactory,” and explaining that “[t]he mediator provides a framework and helps conduct the mediation, but makes no substantial suggestions or decisions in the case”); WEINSTEIN, *supra* note 6, at 1, 22 (defining mediation as a process in which an “impartial third party assists people in conflict to resolve their dispute”).

⁷⁴ KENNETH CLOKE & JOAN GOLDSMITH, *RESOLVING CONFLICTS AT WORK: A COMPLETE GUIDE FOR EVERYONE ON THE JOB* 238 (2000) (discussing how mediation “separat[es] people from problems and positions from interests, surfac[es] motivation and generat[es] options”).

⁷⁵ KENNETH CLOKE, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* 11 (2001) (discussing the alternative definitions of the role of a mediator).

⁷⁶ CLOKE & GOLDSMITH, *supra* note 19, at 63–64 (discussing the techniques used by mediators when they encounter resistance in getting to the core of the story).

⁷⁷ *Id.* at 64.

generally passes through four stages: introduction, storytelling, problem solving, and resolution.⁷⁸

In order to set up this environment, mediators begin with an introduction.⁷⁹ Although mediators adopt different introductory structures, most mediators include the following parts: (1) introduction of mediators and parties; (2) words of encouragement; (3) explanation of the process and definitions of mediation and the mediator's role; (4) ground rules or communication guidelines;⁸⁰ (5) confidentiality provisions;⁸¹ (6) caucus

⁷⁸ KATHY DOMENICI & STEPHEN W. LITTLEJOHN, *MEDIATION: EMPOWERMENT IN CONFLICT MANAGEMENT* 63–64 (2d ed. 2001); *see, e.g.*, ALLAN J. STITT, *MEDIATION: A PRACTICAL GUIDE* 55 (2004). The mediation model that Stitt uses involves seven stages: (1) setting the table; (2) storytelling; (3) determining interests; (4) setting out the issues; (5) brainstorming options; (6) selecting the durable options; and (7) closing the mediation. *Id.*

⁷⁹ *See* DOMENICI & LITTLEJOHN, *supra* note 78, at 64–70 (discussing the primary purposes of the introduction: (1) to introduce the disputants to the mediators and to each other; (2) to give an explanation of the process; and (3) to begin establishing trust); STITT, *supra*, at 55–56 (discussing how the mediator's first step is to "set the table" for the mediation both literally and figuratively).

⁸⁰ STITT, *supra* note 78, at 62–64, 77. In order to foster trust and create a safe environment, proponents of mediation recommend setting ground rules for the parties to abide by. For example, Stitt explains that the mediator may set a rule that allows only one person to speak at a time or prohibit personal attacks and the use of inappropriate language. Stitt describes how guidelines provide for open dialogue because it allows the non-speaking party to write down any comments or concerns so that the mediator can later address the dialogue. *Id.* These rules would be beneficial in the bullying context because the Target may never before have had the opportunity to speak to the bully uninterrupted. Stitt discusses how the "one person speaking at a time" rule may not work in all situations. Stitt stresses that it is most important for the parties to be comfortable with the environment the mediator has created and less important for the parties to focus primarily on a process that suits the mediator. *Id.*; *see also* WEINSTEIN, *supra* note 6, at 60 (discussing how the mediator's role is to act as a buffer between allowing the parties to express themselves, yet protect them from attack); PAUL J. ZWIER & THOMAS F. GUERNSEY, *ADVANCED NEGOTIATION AND MEDIATION THEORY AND PRACTICE* 19 (2005) (discussing the use of active listening that utilizes silence, "Mm-hm," restatement and paraphrasing, clarification, reflection, and interpretation). Zwier & Guernsey assert that these listening tools will allow the Target to have the floor while speaking. This type of empowerment may also alleviate the unequal power relationship between the Target and bully. Moreover, silence on part of the non-speaking party allows for the integration of interactive listening. A mediator that incorporates interactive listening techniques paraphrases what the speaking party has said before allowing the other party to begin speaking or respond. *Id.*

⁸¹ VINDELØV, *supra* note 73, at 99 (discussing how a "mediator has a duty of confidentiality in respect of what takes place, and that the parties themselves must be willing to refrain from discussing the conflict with third parties, unless they agree

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possibility;⁸² (7) signing the agreement to mediate; and (8) asking for questions.⁸³

Once the parties are together and agree on ground rules, the mediator works to “establish a common sense of purpose and remind [the parties] of the idealistic concerns that brought them together”⁸⁴ by beginning the “storytelling” phase.⁸⁵ It is during this phase that the parties tell their side, usually for the first time.⁸⁶ The purpose of the mediation is furthered when the mediator gives the parties some control over the mediation’s agenda.⁸⁷ Moreover, when the parties structure the agenda by coming to an agreement on the importance of the dispute, they take another step in a direction that reestablishes their trust and also continues to advance communication.⁸⁸ Communication is enhanced when the mediator acknowledges that not only “what is said” is important, but also “how it is said.”⁸⁹ Many techniques commonly utilized during the storytelling phase carry the mediation into the problem-solving phase.⁹⁰

otherwise.”). Vindeløv further explains that “[c]onfidentiality creates a space within which the parties can safely make concessions and express their wishes.” *Id.*; see also STITT, *supra* note 78, at 52 (discussing how the open flow of communication is grounded in the confidentiality of the process).

⁸² Nancy Kauffman & Barbara Davis, *Matching Parties’ Goals with Mediation Styles*, in HANDBOOK ON MEDIATION 105 (Thomas E. Carbonneau et al. eds., 2006) (defining “caucus” as “a time when the mediator meets with each party separately”).

⁸³ DOMENICI & LITTLEJOHN, *supra* note 78, at 65.

⁸⁴ CLOKE & GOLDSMITH, *supra* note 19, at 130.

⁸⁵ DOMENICI & LITTLEJOHN, *supra* note 78, at 67, 71. The storytelling phase begins when the parties work to identify the problem by sharing their perceptions of one another. This is done when the parties tell and re-tell their stories, which helps them to “clarify their needs as they listen to each refinement of their story and sift out what’s nonessential.” *Id.*

⁸⁶ STITT, *supra* note 78, at 69 (stating that the purpose of the “storytelling” phase is to get the facts on the table).

⁸⁷ ZWIER & GUERNSEY, *supra* note 80, at 19.

⁸⁸ *Id.* at 85.

⁸⁹ JOHN M. HAYNES ET AL., *MEDIATION: POSITIVE CONFLICT MANAGEMENT* 170 (2004) (discussing the importance of the proper use of language—the mediator should use language in a neutral fashion to put all of the parties on equal footing, thereby meeting the needs of the participants and balancing the unequal distribution of power between the parties. The mediator’s use of language helps the parties to create change and difference between them in a respectful and safe environment).

⁹⁰ DOMENICI & LITTLEJOHN, *supra* note 78, at 73–91 (discussing examples such as listening techniques, restating, summarizing, asking questions, reframing, reflecting, acknowledging, issue framing, agenda setting, and option generation).

Whether the mediator is ending a particular mediation session, ending the mediation altogether, or approaching a resolution, the mediator is usually cautious to use the appropriate tone.⁹¹ A mediator has the ability to destroy the trust that she has established with and between the parties if the mediator appears to be rushing the close of the mediation.⁹² At this point, mediators often request that the parties restate their perceptions of the conflict between them and the agreement reached.⁹³ Depending on the specifics of the underlying conflict between the parties, the mediator may want to consider asking the parties to write up the agreed-upon resolution.⁹⁴ Drafting an agreement forces the parties to focus on articulating their goals and how they want to obtain them.⁹⁵ Overall, this note demonstrates that all types of mediation share some common characteristics.

B. *Types of Mediation*

While aiding the parties, mediators often use certain techniques specific to the dispute and “differ in their degree of directiveness or control.”⁹⁶ Irrespective of how controlling a mediator is, “the mediator performs the role of catalyst that enables the parties to initiate progress toward their own resolution of issues in dispute.”⁹⁷ The types of mediation addressed in this section are facilitative, transformative, and evaluative mediation.

1. *Facilitative Mediation*

⁹¹ ZWIER & GUERNSEY, *supra* note 80, at 144–45 (discussing how mediations need to end in the same way that they begin, especially ending on the proper tone).

⁹² *Id.*

⁹³ *Id.* at 145 (providing for a summary of the mediation and the resolution reached).

⁹⁴ *Id.* (discussing the importance of memorializing the resolved and unresolved issues).

⁹⁵ *Id.*

⁹⁶ MASTERS & ALBRIGHT, *supra* note 73, at 144–45 (describing mediators as often wearing the hat of a “housekeeper, ringmaster, educator, communicator, and innovator”). “Some mediators set the stage for bargaining, make minimal procedural suggestions, and intervene in the negotiations only to avoid or overcome a deadlock. Other mediators are much more involved in forging the details of a resolution.” *Id.*

⁹⁷ *Id.* at 144.

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A facilitative model⁹⁸ of mediation is designed to overcome conflict by way of active listening and sharing emotions.⁹⁹ As a facilitator, the mediator promotes the flow of information between the parties, and assists them in understanding the conflict, encouraging them to closely probe the factors that led to the dispute.¹⁰⁰ It is the mediator's role to help the parties get past their preconceived notions about the other party.¹⁰¹ As a facilitator, the mediator is responsible to guide the dialogue so that the parties can rise above the barriers created by the conflict and overcome the underlying issues hindering their communication.¹⁰²

A facilitative mediator does not share her opinion regarding possible solutions.¹⁰³ A mediator who shares her opinion too early in the process may

⁹⁸ See generally Carole J. Brown, *Facilitative Mediation: The Classic Approach Retains Its Appeal*, 4 PEPP. DISP. RESOL. L.J. 279 (2004). Brown explains that facilitative mediation is based on two "guiding principles":

[T]hat (1) of self-determination of the parties with respect to the resolution of their disputes; and (2) that of the neutral third party facilitator who facilitates communication among the parties, promotes understanding of the issues, focuses the parties on their interests and seeks creative problem-solving, including creative solutions outside the legal normative box, in order to enable the parties to reach their own agreements and resolutions to their problems.

Id. at 283.

⁹⁹ CLOKE, *supra* note 75, at 11; see also Kauffman & Davis, *supra* note 82, at 106 (discussing how "[f]acilitative mediators focus more on emotional aspects of disputes, acknowledging and reframing parties' concerns and assisting them in constructing a workable plan for future behavior," and how it "empowers parties to take hold of the reins of decision-making after airing their differences; it recognizes the parties' inherent right to control their own destinies"); see also CRAWLEY & GRAHAM, *supra* note 23, at 102–05 (discussing the use of facilitative techniques in mediation in order to highlight "common ground [in order to] set a more positive tone and reduce the sense of separation between the parties").

¹⁰⁰ WEINSTEIN, *supra* note 6, at 24 (discussing the types of roles mediators can choose from); see also DOMENICI & LITTLEJOHN, *supra* note 78, at 22 (describing a facilitator as someone who "maintains very strong control of the process, often makes judgments about the respective [sides], and frequently [suggests how to resolve the dispute]").

¹⁰¹ WEINSTEIN, *supra* note 6, at 24.

¹⁰² *Id.*; see also DOMENICI & LITTLEJOHN, *supra* note 78, at 33 (discussing briefly how facilitative mediators are known as "process managers" because they guide the parties through an open exploration of their interests and options, acting as a manager of the process).

¹⁰³ Douglas E. Noll, *A Theory of Mediation*, in HANDBOOK ON MEDIATION 22 (Thomas E. Carbonneau et al. eds., 2006) (comparing evaluative and facilitative mediation).

“impair impartiality.”¹⁰⁴ A facilitative mediator is responsible for providing the parties with a “reality check” by “help[ing] the parties understand each side’s position and the consequences of not [reaching a mutually satisfying resolution].”¹⁰⁵ The mediator does this by assisting the parties to “generate and assess proposals designed to accommodate those interests and positions.”¹⁰⁶

2. Transformative Mediation

Transformative mediation¹⁰⁷ is a process of “*conflict transformation*—that is changing the quality of conflict interaction.”¹⁰⁸ Transformative mediation is based on the parties’ movement “from weakness to strength and from self-absorption to understanding of one another.”¹⁰⁹ These “dynamic shifts are called *empowerment* and *recognition*.”¹¹⁰ A transformative mediator’s “primary goals” are:

¹⁰⁴ *Id.* at 22.

¹⁰⁵ *Id.* at 22–23.

¹⁰⁶ *Id.* at 23.

¹⁰⁷ ROBERT A BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 65–66 (2005) (defining transformative mediation as “a process in which third parties work with parties in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, as they explore and discuss issues and possibilities for resolution.”). Bush and Folger further suggest that “[t]he mediator’s role is to help the parties make positive interactional shifts (empowerment and recognition shifts) by supporting the exercise of their capacities for strength and responsiveness, through their deliberation, decisionmaking, communication, perspective talking, and other party activities.” *Id.*; see also ROBERT A BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT* 283–84 (1994) (*quoted in* MASTERS & ALBRIGHT, *supra* note 73, at 157) (“The problem-solving approach to mediation does not offer a meaningful alternative to adjudicative forums. Reaching settlements through mediation as currently practiced is, in a fundamental sense, not that different from settling disputes through arbitration.”).

¹⁰⁸ BUSH & FOLGER, *TRANSFORMATIVE APPROACH*, *supra* note 107, at 53 (“In the transformative mediation process, parties can recapture their sense of competence and connection, reverse the negative conflict cycle, reestablish a constructive (or at least neutral) interaction, and move forward on a positive footing, with the mediator’s help.”).

¹⁰⁹ *Id.* at 56.

¹¹⁰ *Id.*; see also DOMENICI & LITTLEJOHN, *supra* note 78, at 18–19 (discussing how the “‘transformative’ approach suggests that if we empower parties to define issues and settlement terms for themselves, they can better understand each other’s specifics and create more genuine solutions to their problems”).

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(1) to support empowerment shifts, by supporting—*but never supplanting*—each party’s deliberation and decisionmaking, at every point in the session where choices arise (regarding either process or outcome) and (2) to support recognition shifts, by encouraging and supporting—*but never forcing*—each party’s freely chosen efforts to achieve new understandings of the other’s perspective.¹¹¹

A transformative mediator supports empowerment by avoiding behaviors that are too focused on giving advice—for example, “taking sides, expressing judgments, or being directive.”¹¹²

3. *Evaluative Mediation*

In evaluative mediation,¹¹³ the evaluator focuses more on the parties’ legal rights and less on satisfying their personal interests.¹¹⁴ It is common for evaluative mediators to give the parties advice and make assessments throughout the mediation.¹¹⁵ An evaluator is responsible for leading the parties toward a settlement, without helping the parties come “to grips with the underlying, essentially unresolvable issues that gave rise to the conflict in the first place.”¹¹⁶ When a mediator adopts this style, the parties are obligated to “present persuasive arguments that . . . convince the mediator that the disputant has a strong case and will win if the matter goes to trial.”¹¹⁷

¹¹¹ BUSH & FOLGER, TRANSFORMATIVE APPROACH, *supra* note 107, at 66 (emphasis added).

¹¹² *Id.* at 76–77.

¹¹³ Cris M. Currie, *Opinion Wanted: A Theoretical Construct for Mediation Practice*, in HANDBOOK ON MEDIATION, *supra* note 82, at 33 (defining “evaluative mediation” as a “process in which a neutral expresses an opinion as to the likely outcome or value of a legal claim or defense were it to be adjudicated.”).

¹¹⁴ Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267, 269 (2001) (discussing how “[e]valuative mediation is based on the fundamental belief that disputants can benefit when a knowledgeable and objective third party provides guidance about substantive issues and the merits of their positions”); *see also* BARBARA ASHLEY PHILLIPS, THE MEDIATION FIELD GUIDE: TRANSCENDING LITIGATION AND RESOLVING CONFLICTS IN YOUR BUSINESS OR ORGANIZATION, 168–70 (2001) (discussing the debate over the past decade concerning whether evaluative mediation is actually mediation).

¹¹⁵ Levin, *supra*, at 269.

¹¹⁶ CLOKE, *supra* note 75, at 11.

¹¹⁷ STITT, *supra* note 78, at 2. Stitt explains that if the parties do not agree with the mediator’s evaluation, “the mediator may attempt to persuade them of the accuracy of the assessment. Some evaluative mediators try to bully the disputants into agreeing. Evaluative mediation is therefore sometimes referred to as ‘muscle mediation.’” *Id.*

Critics of evaluative mediation argue that it should “not be considered mediation; it should be called non-binding judging or non-binding arbitration.”¹¹⁸ Moreover, its adversarial qualities make evaluative mediation better suited to accompany litigation.¹¹⁹ This note does not endorse the use of evaluative mediation to resolve workplace bullying because of its adversarial approach to alleviating conflict. Evaluative mediation is important to note, however, in viewing mediations on a spectrum.¹²⁰

C. Benefits of Mediation

Corporate use of mediation has been growing over the last decade.¹²¹ Integrating mediation into the workplace to resolve conflicts can circumvent time-consuming and costly litigation.¹²² Mediation creates the necessary building blocks to construct a foundation for future settlement and resolution.¹²³ The parties communicate openly about the conflict to provide possible outcomes.¹²⁴ As the mediator works to recreate healthy boundaries between the parties, the parties gradually begin to separate themselves from

¹¹⁸ *Id.* at 3.

¹¹⁹ CLOKE, *supra* note 75, at 11 (explaining that evaluative mediation is “directive,” and an evaluator “regards conflict as something to be ended” and the “parties as incapable of ending their conflict by themselves”).

¹²⁰ Evaluative mediation would be at one end of the spectrum—an end that is more adversarial because it does not empower the parties like facilitative and transformative mediation processes.

¹²¹ See David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*, CORNELL/PERC INST. ON CONFLICT RESOL. (1998) (utilizing a previous survey of Fortune 1000 companies and concluding that mediation has been used to resolve all types of disputes in corporate America).

¹²² LIPSKY ET AL., *supra* note 17, at 77; see also WEINSTEIN, *supra* note 6, at 22–23 (discussing how mediation promotes long-term solutions through an accessible, cost-effective conflict resolution process). See DOMENICI & LITTLEJOHN, *supra* note 78, at 36–38, for a discussion on how mediation builds durable results, is convenient, efficient, effective and preventive, preserves relationships or redefines them in a healthy way, and is private and confidential.

¹²³ LIPSKY ET AL., *supra* note 17, at 77.

¹²⁴ STITT, *supra* note 78, at 7; see also MASTERS & ALBRIGHT, *supra* note 73, at 145–48 (discussing how a mediator should help the parties understand their own interests in relation to the other parties’ perception by improving communication).

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the underlying conflict and regain rational perceptions of the other party.¹²⁵ When the parties work together to resolve underlying causes of the dispute, they are more likely to comply with the eventual agreement.¹²⁶

IV. MEDIATION CAN RESOLVE WORKPLACE BULLYING

Part IV describes in greater detail why mediation is appropriate to alleviate workplace bullying, recommends a facilitative mediation process that integrates transformative mediation's strengths, and suggests a facilitative mediation structure that may be more adaptive to bullying issues and has a greater likelihood of achieving success. Overall, the goal of mediating bullying issues should be to repair the broken relationship.¹²⁷ An employer faced with bullying-related issues should consider a step-by-step process that provides not only for speed, but also for confidentiality.¹²⁸ Furthermore, implementing and endorsing mediation provides the employer a window to demonstrate its commitment to its employees and their job satisfaction, while simultaneously benefiting from a reduction in workplace conflict.¹²⁹

Mediation is a process that can be utilized to diffuse workplace bullying because proponents of mediation recommend the process when factors regarding the dispute involve:

[I]ssues [that] are too emotional to discuss without the calming influences of a third party. [At least one party is] too exhausted to go on further without some prodding or encouragement. [The parties] want to maintain a good relationship or avoid further damages. [The parties] really do want to solve the problem or reach an agreement. [The parties] have difficulty communicating with the other side, regardless of whose fault it is. [The parties] want to avoid costly, protracted, formalistic procedures that invite adversarial representations of the dispute. [One party] may fear further direct exchange without another party present. [C]ultural differences [exist]

¹²⁵ CLOKE & GOLDSMITH, *supra* note 19, at 172; *see also* HAYNES ET AL., *supra* note 89, at 5 (discussing how mediators focus on helping the parties develop a new mutual and neutral perception of the underlying causes of the issues to be resolved in the mediation).

¹²⁶ LIPSKY ET AL., *supra* note 17, at 78.

¹²⁷ CRAWLEY & GRAHAM, *supra* note 23, at 3; *see also* PETER LOVENHEIM, *MEDIATE, DON'T LITIGATE: HOW TO RESOLVE DISPUTES QUICKLY, PRIVATELY, AND INEXPENSIVELY WITHOUT GOING TO COURT* 19 (1989) (discussing how disputes between co-workers over personal matters that interfere with work performance is one example of a dispute that is well-suited for mediation).

¹²⁸ CRAWLEY & GRAHAM, *supra* note 23, at 4.

¹²⁹ WEINSTEIN, *supra* note 6, at 4.

that impair communications and understanding. [The parties] understand the mediation process, what it is supposed to do, and what your role is in the process.¹³⁰

For many people, their job represents their self-worth.¹³¹ When employers scrutinize employees' work products, employees internalize this scrutiny and feel their professional and personal status in their work environment is being threatened.¹³²

A. Facilitative Mediation, Integrating Transformative Mediation Techniques Is Well-Suited to Resolve Workplace Bullying Conflict

Facilitative mediation is best used in situations where there is an ongoing relationship because it "will better help the parties to repair the relationship."¹³³ Because the workplace is filled with different types of ongoing relationships, facilitative mediation, as an in-house conflict resolution process, should be used to resolve bullying. Facilitative mediation, also referred to as "interest-based mediation," is well suited for dealing with Targets and bullies because it seems "therapeutic due to the process" by which it achieves an outcome between the parties.¹³⁴ However, every system

¹³⁰ MASTERS & ALBRIGHT, *supra* note 73, at 148–49.

¹³¹ WEINSTEIN, *supra* note 6, at 37; *see also* Dayal Mirchandani, *Self Love-Living Beyond Job Identity*, LIFE POSITIVE, Dec. 2003, http://www.lifepositive.com/Mind/self-love/Living_Beyond_Job_Identity.asp (discussing how workers immerse themselves into their job and identify with their employment).

¹³² WEINSTEIN, *supra* note 6, at 37–38.

¹³³ Scott H. Hughes, *Alternative Dispute Resolution: Facilitative Mediation or Evaluative Mediation: May Your Choice Be a Wise One*, 59 ALA. LAW. 246, 249 (1998) (discussing how this type of repair is "crucial to solidify any resolution of the dispute"). Hughes explains that a "typical example" of when facilitative mediation would be advantageous to utilize "would be [during] an employer-employee dispute where the employee still works for the employer. . . ." *Id.*

¹³⁴ Susan Nauss Exon, *The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U.S.F. L. REV. 577, 591 (2008) (discussing that a facilitative mediator assists the parties in achieving an outcome by placing an "emphasis on information and understanding to reach an agreement rather than through a mediator's influence or coercion"). It is the development of "information and understanding" between the parties that is essential to leveling the imbalance of power between the Target and bully. *Id.*; *see also* Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155, 162–63, 167 (1998) (discussing how supporters of facilitative mediation stress the emotional benefits and healing effects associated with autonomous

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has drawbacks. Therefore, this note endorses a combination of facilitative and transformative mediation—with an emphasis on facilitative mediation and the utilization of transformative techniques to fill a facilitator's shortcomings.

When a facilitator mediator acts in a “directive capacity,” the mediator may decide “which questions to pose, which solutions to emphasize, and how [to] engage the participants.”¹³⁵ A facilitative mediator taking a “directive” approach “tries to educate the parties as to the strength and weaknesses of their claims and the likely consequences of failing to settle.”¹³⁶ For example, it is the mediator's role to explain to both the Target and the bully the importance of resolving their conflict. This differs from transformative mediation, in which the mediator moves away from encouraging the parties to achieve a problem-solving outcome and instead motivates the parties to “decide the terms of the settlement themselves.”¹³⁷ In determining their own settlement, parties “creat[e] a higher vision of self and society, one based on moral development and interpersonal relations rather than on satisfaction and individual autonomy.”¹³⁸

decisionmaking and “maintain that a process which considers only party norms and values will yield the greatest therapeutic effect”).

¹³⁵ Exon, *supra* note 134, at 592. Exon explains that mediation scholars classify facilitative mediators as “fixer[s], reconciler[s], empoweror[s], norm-generating, and norm-educating.” *Id.* at 601–02. By taking on these roles, a facilitative mediator “reinforces the concept of self-empowerment.” *Id.* at 602.

¹³⁶ Brien Wassner, Note, *A Uniform National System of Mediation in the United States: Requiring National Training Standards and Guidelines for Mediators and State Mediation Programs*, 4 CARDOZO J. CONFLICT RESOL. 1 (2002), available at <http://www.cojcr.org/vol4no1/notes01.html>. Wassner discusses that as the mediator poses questions to increase the parties' understandings of underlying issues, the mediator does so in a caucus. *Id.* This note suggests that when a facilitative mediator is working with a Target and bully, the mediator should utilize a caucus, especially to stress to the bully the consequences of not reaching a mutually satisfying agreement with the Target and that the bully should treat the Target as though the Target is the bully's equal.

¹³⁷ Exon, *supra* note 134, at 593–94 (claiming that through this style the parties “grow, develop, and change their own perspectives to become better human beings”).

¹³⁸ Wassner, *supra* note 136; cf. Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, MEDIATE.COM: RESOLUTION SOLUTIONS, Sept. 2000, <http://www.mediate.com/articles/zumeta.cfm> (discussing how “[t]ransformative mediation is criticized for being too idealistic, not focused enough, and not useful for business or court matters”). This note agrees with this criticism in the context of workplace bullying. Although employers desire managers (or those taking on the role as a bully) to become better human beings, especially if it impacts their bottom line, a process that focuses more on the transformation dimension than settling the dispute may be overreaching human limitations to resolve conflict and the realities of the

The main transformative techniques that should be integrated into the proposed mediation process should be those that foster empowerment and recognition, without placing too much emphasis on transforming the parties as individuals.¹³⁹ Transformative mediation as a whole may not be as well-suited as facilitative mediation for resolving workplace bullying because it allows the parties to “determine the direction of their own process.”¹⁴⁰ The bully has effectively destroyed all trust between the bully and the Target;¹⁴¹ therefore, a facilitative mediator’s goal should be to assist the parties to learn more about themselves and how the process can aid them in preserving their work relationship.¹⁴² The parties can rebuild mutual trust by utilizing mediation to learn the other’s perspective and motivations that have caused the bully’s actions or the Target’s desire to invoke the process.¹⁴³ The result is not only reestablishing trust between the parties, but also creating an understanding of the constraints faced by each party.¹⁴⁴

In helping to dissolve the conflict, the mediator acts as both a facilitator and coordinator.¹⁴⁵ Prior to invoking the process, the Target has probably avoided attempting to express herself, has been unsuccessful, or has been interrupted by the bully.¹⁴⁶ A facilitator can work to remove the boundaries of unequal power, yet lay the foundation for creating and integrating respect

workplace. See Jeffrey R. Seul, *How Transformative is Transformative Mediation?: A Constructive-Developmental Assessment*, 15 OHIO ST. J. ON DISP. RESOL. 135, 136 (1999) (discussing how Bush and Folger do not offer a theory of human development to support their transformative mediation model—for example, the parties’ mental capacity or readiness to engage this model).

¹³⁹ Ann Begler, *The Transformative Mediation Model*, 3 No. 5 LAW. J., March 9, 2001, at 6 (discussing how empowerment and recognition are the cornerstones of this model). Begler explains that the “underlying theory” of transformative mediation is that each party “can have the experience of being truly recognized, that recognition leads to empowerment, and through empowerment people become much clearer about their goals, options, preferences and resources.” *Id.*

¹⁴⁰ Zumeta, *supra* note 138 (discussing how the parties “structure both the process and the outcome of mediation, and the mediator follows their lead”).

¹⁴¹ CRAWLEY & GRAHAM, *supra* note 23, at 7. For example, the lack of trust, in addition to the imbalance of power, between the Target and bully, may render the bully able to dominate the mediation if the mediator does not direct the parties’ communication toward a settlement and prevent the bully from bullying within the mediation.

¹⁴² STITT, *supra* note 78, at 5.

¹⁴³ *Id.* at 12.

¹⁴⁴ *Id.*; see also Goldman, *supra* note 4; LIPSKY ET AL., *supra* note 17, at 65.

¹⁴⁵ WEINSTEIN, *supra* note 6, at 24.

¹⁴⁶ DAVENPORT ET AL., *supra* note 9, at 102–03.

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and dignity between the parties.¹⁴⁷ However, a facilitative mediator should be aware and ready for the personal attacks that may arise out of open communication addressing the parties' emotions and complaints.¹⁴⁸ This becomes a key moment for the neutral mediator to step in facilitate and transform communication into effective dialogue.¹⁴⁹ It is only a facilitative mediator that would utilize these techniques to place herself in a "position to ground an approach to problem-solving that anchors the behavior and principles of her performance in a manner consistent with consensual decisionmaking."¹⁵⁰ Overall, facilitative mediation that integrates transformative mediation techniques is well-suited to resolve workplace bullying.

B. Structuring a Mediation Process to Achieve Success

Providing an internal mediation process to address workplace bullying allows the employer to intervene early on, prevent disputes from escalating, and foresee future disputes, and enables the mediator to manage the different needs and personalities of the parties.¹⁵¹ In order to effectively reduce workplace bullying and the interpersonal conflict that results from it, the organization must invest time and money into changing the perception and behavior of supervisors, especially high-level managers.¹⁵² Integrating mediation and the skills that develop from using a mediation process is a non-threatening and cost-effective¹⁵³ way of enabling supervisors to manage without resorting to behaviors that ratify or result in bullying.¹⁵⁴

¹⁴⁷ STITT, *supra* note 78, at 13.

¹⁴⁸ *Id.*; see also Carey, *supra* note 34, at F1 (discussing how subordinates face high costs when going behind the bullying boss' back to complain to Human Resources).

¹⁴⁹ STITT, *supra* note 78, at 13.

¹⁵⁰ E. Patrick McDermott & Ruth Obar, "What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit, 9 HARV. NEGOT. L. REV. 75, 85 (2004) (citing Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 1005 (1997)).

¹⁵¹ CRAWLEY & GRAHAM, *supra* note 23, at 3. See generally MARSHA PETRIE SUE, TOXIC PEOPLE: DECONTAMINATE DIFFICULT PEOPLE AT WORK WITHOUT USING WEAPONS OR DUCT TAPE (2007) (discussing how managers and employees can work together to take group and personal responsibility for their workplace that will lead to an environment that will develop morale, success, and teamwork).

¹⁵² CRAWLEY & GRAHAM, *supra* note 23, at 16.

¹⁵³ Wassner, *supra* note 136. Wassner explains that although a mediator does not have to be an expert in the dispute topic, the mediator "must be skilled in facilitating

Many conflict-ridden workplaces foster cultures that make it taboo to file a complaint against a co-worker or supervisor.¹⁵⁵ In order for mediation to be successful at mitigating the long-term costs of bullying and resolving the immediate interpersonal conflict between parties, organizations need to adopt mission statements and policies that foster objectives and employee development opposed to bullying.¹⁵⁶ Moreover, employers should inform employees that the organization has a conflict resolution system, such as mediation, in place.¹⁵⁷ A Target may be too intimidated to request mediation to cease the bullying, or may already be undergoing worsened mistreatment as a result of the request.¹⁵⁸ Thus, establishing a workplace policy opposed to bullying¹⁵⁹ promotes awareness of the benefits of mediation and prevents intimidation that may hinder an employee from seeking help.¹⁶⁰

An employer's priority in designing an effective mediation process should be to ensure that no conflict of interest exists between the mediator and any employee involved in the process. Accordingly, a neutral, internal Human Resource (HR) manager could serve as an effective in-house

understanding and communication between the parties." *Id.* The fact that a facilitative mediator does not have to be an expert coincides with this note's suggestion of utilizing an internal and neutral human resources manager. Moreover, smaller business can take advantage of utilizing an in-house HR manager as a facilitative mediator without worrying about the expense of hiring an outsider. *Id.*

¹⁵⁴ CRAWLEY & GRAHAM, *supra* note 23, at 16; *see also* Mayhew, *supra* note 22, at 30 ("If inappropriate behaviours have been tolerated or ignored for some time, the [bully] may have come to believe bullying is acceptable and normal.").

¹⁵⁵ WEINSTEIN, *supra* note 6, at 37.

¹⁵⁶ DAVENPORT ET AL., *supra* note 9, at 142; WEINSTEIN, *supra* note 6, at 43 (discussing how an employer's commitment to the mediation process is essential for its success). Weinstein asserts that an employer's superficial commitment to the process promotes distrust and is more likely to destroy the already damaged relationships. *Id.*

¹⁵⁷ DAVENPORT ET AL., *supra* note 9, at 142 (discussing twelve components for creating a caring and nourishing work environment).

¹⁵⁸ *Id.* at 102–03 (discussing an example of how one particular employee coped with the bullying that he was experiencing at work).

¹⁵⁹ *See, e.g.*, ROBERT SUTTON, THE NO ASSHOLE RULE: BUILDING A CIVILIZED WORKPLACE AND SURVIVING ONE THAT ISN'T 58 (2007) (discussing how to implement a "no asshole rule," enforce it, and keep it alive in the workplace). A no asshole rule can range from a formalized and censored written policy that reinforces "core values" of respect to an informal "time-honored rule . . . which holds that 'you're not allowed to yell at your secretary or yell at each other.'" *Id.* Sutton also discusses the importance of weaving the rule into hiring and firing practices, and extending the rule to customers and clients. *Id.*

¹⁶⁰ *See* DAVENPORT ET AL., *supra* note 9, at 143 for a discussion on how to reduce the risks of mobbing.

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mediator. This HR manager can assist employees victimized by workplace bullying and can alleviate the effect of bullying on all those involved.¹⁶¹ In this recommendation, the mediator would have an interest in the outcome of the mediation as an employee of the organization, yet seeking that outcome would not be a conflict of interest.¹⁶² Utilizing a Human Resource manager that is not responsible for evaluating the performance of any of the parties involved in mediation will create a safe environment so that the mediator can manage the bullying constructively.¹⁶³

Common drawbacks of mediation are unlikely to affect the recommended process. In general, adversaries of mediation believe alternative dispute resolution systems undermine our legal system's sense of justice.¹⁶⁴ A confidential mediation process takes place in a private forum where society can no longer learn and benefit from its outcome.¹⁶⁵ However, some of the common disadvantages of mediation would not apply to the proposed facilitative mediation process recommended to address workplace bullying.¹⁶⁶ Critics of alternative dispute resolution argue that there is an imbalance of power between employers and employees and that employers benefit from the repeat player effect.¹⁶⁷ These drawbacks are of no consequence when mediation is integrated into workplace policies to specifically address bullying. The imbalance of power between the supervisor, co-worker, or subordinate is eliminated because these parties work together with a neutral HR manager to resolve the bullying issue. This imbalance of power is further mitigated because the employer mandates that its workplace policies be respected and conflict be resolved. Overall, employers should consider carefully the type of mediation process that would be most successful in their organization.

V. CONCLUSION

¹⁶¹ See WEINSTEIN, *supra* note 6, at 3 (recommending that smaller organization can still utilize mediation programs by networking with other small organizations).

¹⁶² STITT, *supra* note 78, at 41–42.

¹⁶³ CRAWLEY & GRAHAM, *supra* note 23, at 4; STITT, *supra* note 78, at 41.

¹⁶⁴ LIPSKY ET AL., *supra* note 17, at 76–78.

¹⁶⁵ *Id.* at 78.

¹⁶⁶ STITT, *supra* note 78, at 7.

¹⁶⁷ LIPSKY ET AL., *supra* note 17, at 78–79 (discussing how employers who made repeated use of arbitration won the majority of their cases, while employers who used arbitration less frequently, lost frequently); STITT, *supra* note 78, at 7.

Workplace bullying is not just a problem that we laugh at on television—it is real and it affects people. Employers should not ignore workplace bullying and need to start addressing the underlying issues causing the conflict. As the economic crisis worsens, employers continue to struggle to remain afloat. As we move forward, employers need to strategize on how to create safe work environments conducive to communication and the integration of a mediation process grounded in facilitative and transformative techniques.